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No. 72-747

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

BLOOMFIELD HILLS SCHOOL DISTRICT,

Petitioner

v.

STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
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BLOOMFIELD HILLS SCHOOL DISTRICT,

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v.

STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner prays that a writ of certiorari be issued to review an Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding.

OPINIONS AND ORDERS BELOW

The June 14 Ruling and Order of the District Court in *Bradley, et al.* v. *Milliken, et al. ("Bradley")*, which gave rise to the Petition for Writ of Mandamus and/or Prohibition referred to below is reported at 345 F.Supp. 914 (E.D. Mich., 1972). The Ruling and Order appears in the Appendix (10a to 20a).[1]

The Court of Appeals entered an Order on July 17, 1972 denying petitioner's application for Writ of Mandamus and/or Prohibition. An Order denying Petition for Rehearing was entered by the Court of Appeals on August 24, 1972. Neither Order has been reported. Each order appears in the Appendix (21a and 31a).

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit denying petitioner's application for Writ of Mandamus and/or Prohibition was entered on July 17, 1972. A timely petition for rehearing was denied on August 24, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is in-

[1] Parenthetical page references followed by the letter "a" refer to the page of the printed Appendix hereto.

voked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Did the District Court deprive petitioner of due process of law and thereby usurp the jurisdiction vested in it by including petitioner in its June 14, 1972 Ruling and Order in *Bradley* in disregard of the facts that petitioner was not a party to that action and has never been found to have committed any act of *de jure* segregation?

II. Did the District Court usurp the jurisdiction exclusively vested by Title 28, U.S.C. § 2281 in a United States District Court of three judges by entering the June 14, 1972 Ruling and Order in *Bradley* which restrains the enforcement, operation and execution of various Michigan statutes?

III. Did the Court of Appeals err by denying the petition for issuance of a writ of mandamus and/or prohibition?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States; 62 Stat. 944, 63 Stat. 102, 28 U.S.C. § 1651(a); 62 Stat. 968, 28 U.S.C. § 2281; Rule 21 of the Federal Rules of Appellate Procedure; and Rule 19 of the Federal Rules of Civil Procedure. These are reprinted in pertinent part in the Appendix at 32a to 33a.

Reference is made in this petition to the following provisions of the Michigan School Code of 1955 which are reprinted in the Appendix in pertinent part at 23a to 25a: MCLA 340.77; MCLA 340.352; MCLA 340.356; MCLA 340.569; MCLA 340.575; MCLA 340.583; MCLA 340.589; MCLA 340.614; MCLA 340.882.

Reference is also made in this petition to Article VIII, Section 2 of the Michigan Constitution of 1963; MCLA 38.91 and MCLA 423.209. These are reprinted in pertinent part in the Appendix at 33a to 34a.

STATEMENT OF THE CASE

Petitioner is a school district located in Oakland County, Michigan, organized and existing under the Constitution and laws of the State of Michigan. It is a body corporate under the law of Michigan with independent legal status and possesses broad powers with respect to educating approximately 9300 public school children within its geographical boundaries.

On September 27, 1971, the Hon. Stephen J. Roth, U.S. District Judge, issued a Ruling on Issue of Segregation in *Bradley, et al.* v. *Milliken, et al.*, (338 F.Supp. 582, 594, [E.D. Mich., 1971]) finding a "*de jure* segregated school system in operation in the City of Detroit." On June 14, 1972, Judge Roth entered an Order in *Bradley* denominated Ruling on Desegregation Area and Order for Development of Plan of Desegregation (345 F.Supp. 914 [E.D. Mich., 1972]) which, *inter alia,* mandates pupil reassignment to accomplish desegregation of the Detroit public schools within a geographical area encompassing Detroit and some 53 additional school districts (13a).

The June 14 Ruling and Order includes petitioner within the geographic area which the trial judge deemed requisite for the achievement of a racial mix to correct the segregated condition found by him to exist in the Detroit public schools (14a). Petitioner was included within such area notwithstanding the facts that: (1) Petitioner is not and never has been a party to the proceedings in which the holding of *de jure* segregation relating to the Detroit schools was made or which considered the appropriateness of a metropolitan remedy, and (2) no claim or finding has been made in *Bradley* or any other action that petitioner has committed any act of *de jure* segregation.

Furthermore, the June 14 Ruling and Order restrains petitioner in the enforcement, operation or execution of the powers conferred and the duties imposed upon it by the Constitution and laws of the State of Michigan. Illustrations of such restraints and the statutes with respect thereto are set forth in the Appendix (4a, 5a and 23a-25a).

On June 29, 1972, petitioner filed a Petition for Writ of Mandamus and/or Prohibition (2a) in the Court of Appeals pursuant to

the All Writs Statute (28 U.S.C. §1651). The petition was denied without a hearing by an Order entered July 17, 1972 (21a). A Petition for Rehearing and Suggestion for Hearing *In Banc* (22a) was filed in the Court of Appeals on July 27, 1972. The Petition for Rehearing was denied without a hearing on August 24, 1972 (31a).

On July 20, 1972, the U.S. District Court in *Bradley* made a determination of finality as to certain orders entered therein, thus enabling the parties to that cause to take an appeal. Petitioner, a non-party, had no right to appeal in *Bradley*.

The appeal in *Bradley* was argued in the Court of Appeals on August 24, 1972 and briefs have been submitted by the parties. The Court of Appeals has not yet rendered its opinion.

Disposition of the appeal in *Bradley* may render this petition moot. It is respectfully requested, therefore, that this petition for writ of certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*. Petitioner will promptly advise the Court of its desire to press this petition or withdraw it, depending upon such final action by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT DEPRIVED PETITIONER OF DUE PROCESS OF LAW BY SUBJECTING PETITIONER TO THE JUNE 14, 1972 RULING AND ORDER IN *BRADLEY*.

Petitioner is subjected to the June 14, 1972 Ruling and Order in *Bradley* even though it is not and never has been a party to *Bradley*. No claim or finding of *de jure* segregation has been made against it. As a non-party, petitioner has had no opportunity to examine or cross-examine any witnesses in *Bradley* or present evidence or oral argument therein.

The naked inclusion of petitioner within the ambit of the June 14 Ruling and Order in *Bradley* contravenes Rule 19 F.R.C.P. but, more importantly, is a brazen denial of petitioner's right to fundamental due process.

"The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without

due process of law. An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' Trustees of Dartmouth College v. Woodward, U.S. 1819, 4 Wheat. 518, 581, 4 L.Ed. 629 (Webster's argument). As said in Galpin v. Page, U.S. 1873, 18 Wall. 350, 368, 21 L.Ed. 959: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' (Italics supplied)." *L.B. Wilson, Inc.* v. *Federal Communications Commission*, 170 F.2d 793, 802 (C.A. D.C., 1948)

"A fundamental requirement of due process is 'the opportunity to be heard.' *** It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)

"We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins* v. *McKeithen*, 395 U.S. 411, 428 (1969)

The June 14 Ruling and Order in *Bradley* constitutes a usurpation of judicial power over petitioner. Consequently, the proceedings in *Bradley* are *void* as to petitioner.

School districts in Michigan, which are recognized in the 1963 Michigan Constitution and established by the legislature, are corporate bodies having independent legal status. MCLA 340.352 (24a). Petitioner, therefore, is independent of other defendants in *Bradley* and is independently entitled to fundamental due process.

The subjection of petitioner, a non-party, to the ruling in *Bradley* and, indeed, the imposition of a host of burdens upon petitioner without any hearing or finding with respect to petition-

er presents an extreme departure from the accepted and usual course of judicial proceedings. The District Court's departure was sanctioned by the Court of Appeals through its refusal to even grant a hearing on petitioner's Rule 21 F.R.A.P. Petition for Writ of Mandamus and/or Prohibition in that Court. The failure to afford fundamental due process in these proceedings calls for this Court's exercise of its power of supervision.

II. THE IMPOSITION OF THE JUNE 14 RULING AND ORDER IN *BRADLEY* UPON PETITIONER IS JURISDICTIONALLY DEFECTIVE BECAUSE OF THE DISTRICT COURT'S FAILURE TO CONVENE A THREE-JUDGE COURT IN THAT CASE.

Reduced to its essence, Title 28 U.S.C. §2281 prohibits a one-judge district court from enjoining the enforcement, operation or execution by state officials of state statutes of general application upon the ground that such statutes violate the Constitution of the United States. The purpose of §2281 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963), and to provide "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy," *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). While it is true that §2281 must be strictly construed (*Allen* v. *State Board of Elections*, 393 U.S. 544, 561 [1969]), all of the statutory requisites were present in *Bradley* when the June 14 Ruling and Order was issued.

The June 14 Ruling and Order in *Bradley* interdicts petitioner in the enforcement, operation or execution of powers conferred and duties imposed upon it by the 1963 Constitution and statutes of Michigan. Illustrative of the injunctive effect of that Order are the restraints imposed upon petitioner in carrying out the following responsibilities:

(a) The provision of educational opportunities to resident pupils within the school district. Art. VIII, Sec. 2, Const. 1963; MCLA 340.356, 340.589. (See, 13a).

(b) The employment and allocation of teaching and adminis-

trative staff to educate resident pupils upon terms satisfactory to the school district. MCLA 340.569, 423.209, 38.91. (See, 15a).

(c) The construction, expansion and use of school facilities. MCLA 340.77. (See, 16a).

(d) The establishment of curriculum, activities and standards of conduct and providing for the safety of students, faculty, staff and parents within the school district. MCLA 340.575, 340.583, 340.614, 340.882. (See, 16a).

The effect of the June 14 Ruling and Order upon statutes of statewide application within the "desegregation area" is well summarized in the interim report filed by the Michigan Superintendent of Public Instruction in the District Court in *Bradley* (29a, 30a).

It is clear that the June 14 Ruling and Order enjoins statutes of statewide application rather than statutes which are local in application. *Sailors* v. *Kent Board of Education*, 387 U.S. 105 (1967). The school board of petitioner is composed of "state officers" within the meaning of §2281 because the board is charged with the duty of enforcing policies of statewide concern as set forth in the 1963 Michigan Constitution, the Michigan School Code of 1955 (MCLA 340.1 *et seq.)*, Teachers' Tenure Act (MCLA 38.71 *et seq.)* and Public Employment Relations Act (MCLA 423.201 *et seq.)* within the geographical limits of each school district. See, *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1934).

The June 14 Ruling and Order in *Bradley* is predicated upon a finding that the Michigan statutory educational structure is unconstitutional. It would be a *"contradiction of reason, a usurpation of power"* to attempt to enjoin the enforcement of a statute and at the same time not pass upon the constitutionality of the statute. *United States ex rel. McNeill* v. *Tarumianz*, 242 F.2d 191, 195 (C.A. 3, 1957); *Board of Managers of Arkansas Training School* v. *George*, 377 F.2d 228, 231 (C.A. 8, 1967).

Clearly, it is a "contradiction of reason" to restrain petitioner by the June 14 Ruling and Order from the enforcement, operation

and execution of the powers granted to it under the 1963 Michigan Constitution and nonsegregative statutes of the State of Michigan, thereby nullifying the Michigan educational system as defined by legislative enactments and *not pass upon the constitutionality of such legislative enactments.* Under the mandate of §2281, only a three-judge district court may determine the constitutionality of such laws, enforcement of which is interdicted in the one-judge June 14 Ruling and Order.

An Order entered by a single district judge where a three-judge court should have been convened is void as being beyond the court's jurisdiction. *Stratton* v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10 (1930). The June 14 Ruling and Order was entered without jurisdiction in the District Court and therefore such an order cannot be binding upon petitioner. It constitutes a departure from the accepted and usual course of judicial proceedings. The Court of Appeals sanctioned such a departure by the District Court through its refusal even to grant a hearing on petitioner's Rule 21 F.R.A.P. Petition for Writ of Mandamus and/or Prohibition. The failure to set aside the June 14 Ruling and Order in *Bradley*, as it applied to petitioner, calls for this Court's exercise of its power of supervision.

III. THE COURT OF APPEALS ERRED IN DENYING THE PETITION FOR ISSUANCE OF A WRIT OF MANDAMUS AND/OR PROHIBITION.

The Writ of Mandamus and/or Prohibition sought by petitioner in the Court of Appeals is the writ traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943). By the June 14, 1972 Ruling and Order in *Bradley*, the District Court has exceeded its jurisdiction in two respects:

(a) Petitioner has never been a party to the proceedings in *Bradley*. No claim or finding has been made with respect to petitioner in that action. Petitioner has been afforded no hearing. Absent these basic requirements of due process, the District Court is without jurisdiction over petitioner.

(b) The June 14, 1972 Ruling and Order enjoins the operation of numerous provisions of state law on the ground of the

unconstitutionality thereof. The one-judge District Court was without jurisdiction to enter such an Order.

The District Court's failure to afford due process to petitioner is of vital concern not only to petitioner but to every school district in Michigan and the pupils, teachers, staff and residents thereof. A matter of such "public importance" makes this a "case appropriate for the extraordinary writs." *Morrow* v. *District of Columbia,* 417 F.2d 728, 736, 737 (C.A. D.C., 1969).

Notwithstanding the foregoing, petitioner is subjected to the June 14 Ruling and Order in *Bradley*. This novel and unprecedented usurpation of judicial power by the District Court was unchecked by the Courrt of Appeals in proceedings brought by petitioner before it. This Court, therefore, should grant the within petition to the end that judicial power in these proceedings once again becomes "the power of a court to decide and pronounce a judgment and carry it into effect *between persons and parties who bring a case before it for decision.*" *Muskrat* v. *United States,* 219 U.S. 346, 356 (1911) (emphasis supplied).

CONCLUSION

For the reasons set forth above (but subject to the request set forth in the STATEMENT OF THE CASE to hold this petition in abeyance), petitioner prays for the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLOOMFIELD HILLS SCHOOL DISTRICT, **Petitioner** **vs.** **STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE,** **Respondent**	**No. 72-1651**

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

NOW COMES Bloomfield Hills School District, a Michigan body corporate, Petitioner, and petitions this Court, pursuant to the All Writs Statute (28 U.S.C. § 1651), to issue a writ of mandamus and/or prohibition directing Respondent Stephen J. Roth, Judge of the United States District Court for the Eastern District of Michigan, to:

(i) Delete the geographical area encompassed by Petitioner's boundaries from the "desegregation area" described in Paragraph II A of Respondent's June 14, 1972 Ruling on Desegregation Area and Order for Development of Plan of Desegregation[1] ("June 14, 1972 Ruling and Order") in *Bradley, et al.* v. *Milliken, et al.*, Civil Action No. 35257, United States District Court for the Eastern District of Michigan, Southern Division; and

(ii) Refrain from enforcing each provision of Respondent's June 14, 1972 Ruling and Order which restrains Petitioner from exercising the powers conferred and discharging the duties imposed upon it by the 1963 Constitution and statutes of the State of Michigan.

FACTS SUPPORTING THIS PETITION

1. Petitioner is a Michigan school district classified by the Michigan School Code of 1955 (MCLA §§ 340.1, *et seq.*) as a

[1] See copy attached as Exhibit A.

fourth class district. Based upon data collected for the 1971-72 school year, Petitioner has a pupil enrollment of 9,353 students. Approximately 45.25% of these students are enrolled in K-6 elementary schools. In 1970-71, Petitioner ranked 45th in pupil enrollment among the 527 K-12 local school districts in Michigan. Approximately 86% of the taxable property in the school district is residential and 80.5% of Petitioner's school operating budget is derived from local sources of revenue. Petitioner's staff consists of: (i) 42 instructional and non-instructional administrative personnel; (ii) 474 teachers and teacher aides who are represented by Bloomfield Hills Education Association and are employed under a contract covering wages, hours and conditions of employment which will expire on August 28, 1973; (iii) 236 support service employees who are represented by American Federation of State, County and Municipal Employees (Locals 1384A and 1883A) and are employed under contracts covering wages, hours and conditions of employement which will expire on August 31, 1973 and December 31, 1973. Petitioner owns 16 classroom school buildings located within the district and has a bonded indebtedness at the date hereof of $22,930,000, having maturities from July, 1972 through 1996.

2. *Bradley* v. *Milliken* was commenced on August 18, 1970, by the filing of a complaint which alleged the unconstitutionality of a Michigan statute which was applicable *only* to the City of Detroit school district and further claimed that plaintiffs' constitutional rights were violated because of the segregated pattern of pupil assignments and racial identifiability of schools within the City of Detroit school system. The complaint has never been amended and at no time have the pleadings alleged that any school system other than the Detroit system has failed to maintain a unitary system of schools. A trial on the question of *de jure* segregation in the Detroit schools was held in Respondent's court and concluded on July 22, 1971. On September 27, 1971, Respondent entered his Ruling on Issue of Segregation which was limited to the finding that illegal segregation exists in the public schools of the City of Detroit. Plans of desegregation involving only the Detroit schools as well as plans involving the metropolitan area school districts were subsequently filed with Respondent. Respondent received evidence from the original parties and intervenors relating to such plans. New intervenors (certain school districts, not including

Petitioner) participated in the proceedings on the restricted basis outlined in Respondent's March 15, 1972 Order. On March 24, 1972, Respondent ruled that he could properly order a metropolitan plan to accomplish desegregation of the Detroit schools. On June 14, 1972, Respondent entered his Ruling and Order. That Order includes Petitioner within the geographic area that Respondent deemed necessary to achieve the racial mix required to correct the segregated conditions he found to exist in the Detroit schools.

3. Petitioner is not and never has been a party to the proceedings in which the holding of *de jure* segregation relating to Detroit was made or which considered the appropriateness of a tri-county remedy, nor has any claim ever been made that Petitioner has commited any act of *de jure* segregation.

4. A motion to join Petitioner, together with other school districts in the tri-county area, as a party defendant, was filed by intervening defendants Denise Magdowski, et al., on July 12, 1971, but Respondent has refused to act upon their motion.

5. The first paragraph of Respondent's June 14, 1972 Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan specifically states that Respondent "has taken no proofs with respect to . . . the issue of whether, with the exclusion of the City of Detroit school district, such school districts [all 86 school districts, including Petitioner, located within Wayne, Oakland and Macomb Counties] have commited acts of de jure segregation."

6. Among the powers conferred and duties imposed upon Petitioner by the Michigan School Code of 1955 are the following: (i) To sue and be sued in its name, (ii) to purchase personal and real property for educational purposes, (iii) to employ a superintendent, administrative personnel and teachers for the education of its pupils, (iv) to establish courses of studies and select text books to be utilized therein, and (v) otherwise to establish policies for the education of the pupils residing within its corporate limits.[2]

---

[2]See MCLA §§ 340.353; 340.77; 340.66; 340.569; 340.583; 340.882; 340.575; 340.578; 340.613; 340.614 as illustrative of the powers and duties set forth.

7. Respondent's June 14, 1972 Ruling and Order restrains Petitioner in the enforcement, operation or execution of the powers conferred and the duties imposed upon it by the 1963 Constitution and statutes of the State of Michigan in the following respects:

(a) The allocation of Petitioner's staff or other services and the expenditures therefore. (¶ I C)

(b) The enrollment in and attendance at Petitioner's schools only of children who are residents. (¶ II B, C, D, E)

(c) The employment of qualified teachers to educate resident pupils upon terms satisfactory to Petitioner. (¶ II F, G)

(d) The use of Petitioner's school facilities. (¶ II H)

(e) The construction or expansion of school facilities. (¶ II I)

(f) The curriculum, activities and standards of conduct; the dignity and safety of Petitioner's students, faculty, staff and parents. (¶ II K)

Like restraints are imposed upon the other 53 school districts included within Respondent's June 14, 1972 Ruling and Order.

8. Respondent's June 14, 1972 Ruling and Order restrains the Michigan State Board of Education and the Superintendent of Public Instruction in the enforcement, operation or execution of the powers conferred and the duties imposed upon each of them by the 1963 Constitution and statutes of the State of Michigan in the following respects:

(a) The construction of new school facilities and the expansion of existing facilities. (¶ II I)

(b) The training and use of faculty and staff and the conduct of extra-curricular activities. (¶ II L)

ISSUES PRESENTED

1. Did Respondent deprive Petitioner of due process of law and thereby usurp the jurisdiction vested in him as a United States

District Judge by subjecting Petitioner to his June 14, 1972 Ruling and Order in disregard of the facts that Petitioner was not a party to the action and was not found to have committed any act of *de jure* segregation?

2. Did Respondent usurp the jurisdiction exclusively vested by Title 28, USC § 2281 in a United States District Court of three judges by entering the June 14, 1972 Ruling and Order which restrains the enforcement, operation and execution of various Michigan statutes?

REASONS WHY WRIT SHOULD ISSUE

I. As a non-party, Petitioner cannot appeal Respondent's June 14, 1972 Ruling and Order. That order has immense impact upon the 9,300 children being educated by Petitioner and upon the 770,000 other children being educated within the 54 districts the order affects. The totally unknown effects which massive tri-county busing may have upon the education and safety of these children as well as the undeterminable cost in time and dollars of the order's implementation make this a matter of "public importance" and a "case appropriate for the extraordinary writs." *Morrow* v. *District of Columbia*, 417 F.2d 728 (C.A. D.C. 1969) at 736, 737.

II. Petitioner seeks the writ traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943) at 26. Petitioner is not and never has been a party to *Bradley* v. *Milliken*. Only parties who have been properly subjected to a federal court's *in personam* jurisdiction, and those who have been shown to have acted in concert with such parties, can be legally subjected to the provisions of its injunctive orders. FRCP, Rule 65(d), specifically states: "Every order granting an injunction. . .is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons that act in concert or participation with them. . . ."

The evils prohibited by this provision of Rule 65 were articulated by Judge Learned Hand in *Alemite Manufacturing Corporation* v. *Staff*, 42 F.2d 832, 833 (2d Cir. 1930), as follows:

". . .no court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

* * *

"This is far from being a formal distinction; it goes deep into powers of a court of equity. . . .It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative."

In addition, Respondent has acknowledged that he has taken no proofs as to whether Petitioner or the other affected school districts (with the exception of the Detroit school district) have committed acts of *de jure* segregation. Absent such a finding, Respondent's remedial powers cannot extend to Petitioner. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Spencer v. Kugler,* 326 F. Supp. 1235 (1971), *aff'd.* 92 Sup. Ct. 707 (1972).

III. The aim of Congress in creating United States district courts of three judges was to erect "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips* v. *United States,* 312 U.S. 246, 251 (1940). The legislative history of Title 28 USC § 2281 indicates that the section was "enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire [state] regulatory scheme by issuance of a broad injunctive order." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154 (1962). Other decisions of the United States Supreme Court represent "unmistakable recognition of the congressional policy to provide for a three-judge court whenever a state statute is sought to be enjoined on grounds of federal unconstitutionality. . . ." *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, 81 (1959).

Where such circumstances are present, the case is one "that is *'required* by. . .Act of Congress to be determined by a district court of *three judges.*' 28 USC § 1253. (Emphasis added.)" *Florida Lime Growers, supra,* at 85.

It is manifest that Respondent's June 14, 1972 Ruling and Order enjoins Petitioner (and 53 other tri-county school disctricts) from exercising and discharging a veritable host of powers and duties conferred upon each of them by the Michigan School Code of 1955. See paragraphs 7 and 8 of Facts, *supra.* Beyond all this, Respondent baldly orders the State Superintendent of Public Instruction to ignore state law in his recommendations to Respondent, if such law "conflicts with what is necessary to achieve the objectives of" Respondent's June 14, 1972 Ruling and Order. If ever an order of an individual United States District Judge "paralyzes" or "dooms" a state's legislative policy, the order in question is it. One can scarcely imagine a clearer case for application of the principle enunciated in *Phillips, supra.* The 780,000 school children residing in the affected geographic area, together with their parents, teachers and school administrators, are without doubt entitled to the procedural protection afforded, in Congress' wisdom and through its mandate, by a court of three judges. The convictions, and indeed prejudices, of an individual judge, no matter how learned, must be tempered when an injunction having the disruptive and dismantling effects of Respondent's June 14, 1972 Ruling and Order is at issue.

INTERIM RELIEF REQUESTED

To implement the Writ of Mandamus and/or Prohibition sought herein by Petitioner, Petitioner prays this Court to stay or suspend forthwith the proceedings, at least to the extent they affect Petitioner, contemplated by Respondent's June 14, 1972 Order and Ruling until such time as the ruling relative to this Petition has occurred.

ULTIMATE RELIEF REQUESTED

Issuance of the writ herein requested.

DICKINSON, WRIGHT, McKEAN & CUDLIP

By: /s/ Fred W. Freeman

/s/ Charles F. Clippert

/s/ Robert V. Peterson

Attorneys for Petitioners
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(313) 646-4300

Dated: June 26, 1972

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs v. WILLIAM G. MILLIKEN, et al., Defendants and DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor and DENISE MAGDOWSKI, et al., Defendants-Intervenor *et al.*	CIVIL ACTION No. 35257

RULING ON DESEGREGATION AREA AND ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION

On September 27, 1971 the court made its Ruling on Issue of Segregation, holding that illegal segregation exists in the public schools of the City of Detroit as a result of a course of conduct on the part of the State of Michigan and the Detroit Board of Education. Having found a constitutional violation as established, on October 4, 1971 the court directed the school board defendants, City and State, to develop and submit plans of desegregation, designed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. The directive called for the submission of both a

"Detroit-only" and a "Metropolitan" plan.

Plans for the desegregation of the Detroit schools were submitted by the Detroit Board of Education and by the plaintiffs. Following five days of hearings the court found that while plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under either Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. The court, in its findings of fact and conclusions of law, concluded that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city," and that it had the authority and the duty to look beyond such limits for a solution to the illegal segregation in the Detroit public schools. Accordingly, the court ruled, it had to consider a metropolitan remedy for segregation.

The parties submitted a number of plans for metropolitan desegregation. The State Board of Education submitted six - without recommendation, and without indication any preference. With the exception of one of these, none could be considered as designed to accomplish desegregation. On the other hand the proposals of intervening defendant Magdowski, et al., the Detroit Board of Education and the plaintiffs were all good faith efforts to accomplish desegregation in the Detroit metropolitan area. The three plans submitted by these parties have many similarities, and all of them propose to incorporate, geographically, most–and in one instance, all–of the three-county area of Wayne, Oakland and Macomb.

The hearing on the proposals have set the framework, and have articulated the criteria and considerations, for developing and evaluating an effective plan of metropolitan desegregation. None of the submissions represent a complete plan for the effective and equitable desegregation of the metropolitan area, capable of implementation in its present form. The court will therefore draw upon the resources of the parties to devise, pursuant to its direction, a constitutional plan of desegregation of the Detroit public schools.

Based on the entire record herein, the previous oral and written rulings and orders of this court, and the Findings of Fact and Conclusions of Law filed herewith, IT IS ORDERED:

I.

A. As a panel charged with the responsibility of preparing and submitting an effective desegretation plan in accordance with the provisions of this order, the court appoints the following:

1. A designee of the State Superintendent of Public Instruction;*

2. Harold Wagner, Supervisor of the Transportation Unit in the Safety and Traffic Education Program of the State Department of Education;

3. Merle Henrickson, Detroit Board of Education;

4. Aubrey McCutcheon, Detroit Board of Education;

5. Freeman Flynn, Detroit Board of Education;

6. Gordon Foster, expert for plaintiffs;

7. Richard Morshead, representing defendant Magdowski, et al.;

8. A designee of the newly intervening defendants;*

9. Rita Scott, of the Michigan Civil Rights Commission.

Should any designated member of this panel be unable to serve, the other members of the panel shall elect any necessary replacements, upon notice to the court and the parties. In the absence of objections within five days of the notice, and pending a final ruling, such designated replacement shall act as a member of the panel.

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*The designees of the State Superintendent of Public Instruction and newly intervening defendants shall be communicated to the court within seven days of the entry of this order. In the event the newly intervening defendants cannot agree upon a designee, they may each submit a nominee within seven days from the entry of this order, and the court shall select one of the nominees as representative of said defendants.

B. As soon as possible, but in no event later than 45 days after the issuance of this order, the panel is to develop a plan for the assignment of pupils as set forth below in order to provide the maximum actual desegregation, and shall develop as well a plan for the transportation of pupils, for implementation for all grades, schools and clusters in the desegregation area. Insofar as required by the circumstances, which are to be detailed in particular, the panel may recommend immediate implementation of an interim desegregation plan for grades K-6, K-8 or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term. In its transportation plan the panel shall, to meet the needs of the proposed pupil assignment plan, make recommendations, including the shortest possible timetable, for acquiring sufficient additional transportation facilities for any interim or final plan of desegregation. Such recommendations shall be filed forthwith and in no event later than 45 days after the entry of this order. Should it develop that some additional transportation equipment is needed for an interim plan, the panel shall make recommendations for such acquisition within 20 days of this order.

C. The parties, their agents, employees, successors and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district.

II.

A. Pupil reassignment to accomplish desegregation of the Detroit public schools is required within the geographical area which may be described as encompassing the following school districts (see Exhibit P.M. 12), and hereinafter referred to as the "desegregation area":

Lakeshore
Lakeview
Roseville
South Lake
East Detroit
Grosse Pointe
Centerline
Fitzgerald
Van Dyke
Fraser
Harper Woods
Warren
Warren Woods
Clawson
Hamtramck
Lamphere
Madison Heights
Troy
Birmingham
Hazel Park
Highland Park
Royal Oak
Berkley
Ferndale
Southfield
Bloomfield Hills
Oak Park
Redford Union
West Bloomfield
Clarenceville
Farmington
Livonia
South Redford
Crestwood
Dearborn
Dearborn Heights
Fairlane
Garden City
North Dearborn Heights
Cherry Hill
Inkster
Wayne
Westwood
Ecorse
Romulus
Taylor
River Rouge
Riverview
Wyandotte
Allen Park
Lincoln Park
Melvindale
Southgate
Detroit

Provided, however, that if in the actual assignment of pupils it appears necessary and feasible to achieve effective and complete racial desegregation to reassign pupils of another district or other districts, the desegregation panel may, upon notice to the parties, apply to the Court for an appropriate modification of this order.

B. Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom be substantially disproportionate to the overall pupil racial composition. The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation.

C. Appropriate and safe transportation arrangements shall be made available without cost to all pupils assigned to schools deemed by the panel to be other than "walk-in" schools.

D. Consistent with the requirements of maximum actual desegregation, every effort should be made to minimize the numbers of pupils to be reassigned and requiring transportation, the time pupils spend in transit, and the number and cost of new transportation facilities to be acquired by utilizing such techniques as clustering, the "skip" technique, island zoning, reasonable

staggering of school hours, and maximization of use of existing transportation facilities, including buses owned or leased by school districts and buses operated by public transit authorities and private charter companies. The panel shall develop appropriate recommendations for limiting transfers which affect the desegregation of particular schools.

E. Transportation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels. In the determination of the utilization of existing, and the construction of new, facilities, care shall be taken to randomize the location of particular grade levels.

F. Faculty and staff shall be reassigned, in keeping with pupil desegregation, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

G. In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

H. The restructuring of school facility utilization necessitated by pupil reassignments should produce schools of substantially like quality, facilties, extra-curricular activities and staffs; and the

utilization of existing school capacity through the desegregation area shall be made on the basis of uniform criteria.

I. The State Board of Education and the State Superintendent of Education shall with respect to all school construction and expansion, "consider the factor of racial balance along with other educational considerations in making decisions about new school sites, expansion of present facilties * * *"; and shall, within the desegregation area disapprove all proposals for new construction or expansion of existing facilties when "housing patterns in an area would result in a school largely segregated on racial * * * lines," all in accordance with the 1966 directive issued by the State Board of Education to local school boards and the State Board's "School Plant Planning Handbook" (see Ruling on Issue of segregation, p. 13.).

J. Pending further orders of the court, existing school district and regional boundaries and school governance arrangements will be maintained and continued, except to the extent necessary to effect pupil and faculty desegregation as set forth herein; provided, however, that existing administrative, financial, contractual, property and governance arrangements shall be examined, and recommendations for their temporary and permanent retention or modification shall be made, in light of the need to operate an effectively desegregated system of schools.

K. At each school within the desegregated area provision shall be made to insure that the curriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents.

L. The defendants shall, to insure the effective desegregation of the schools in the desegregation area, take immediate action including, but not limited to, the establishment or expansion of in-service training of faculty and staff, create bi-racial committees, employ black counselors, and require bi-racial and non-discriminatory extra-curricular activities.

III.

The State Superintendent of Public Instruction, with the

assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.

Within 15 days of the entry of this order, the Superintendent shall advise the court and the parties of his progress in preparing such recommendations by filing a written report with the court and serving it on the parties. In not later than 45 days after the entry of this order, the Superintendent shall file with the court his recommendations for appropriate interim and final relief in these respects.

In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court, may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation.

IV.

Each party may file appropriate plans or proposals for inclusion in any final order which may issue in this cause. The intent of this order is to permit all the parties to proceed apace with the task before us: fashioning an effective plan for the desegregation of the Detroit public schools.

Fifteen days after the filing of the reports required herein, hearings will begin on any proposal to modify any interim plan prepared by the panel and all other matters which may be incident to the adoption and implementation of any interim plan of desegregation submitted. The parties are placed on notice that they are to be prepared at that time to present their objections,

alternatives and modifications. At such hearing the court will not consider objections to desegregation or proposals offered "instead" of desegregation.

Hearings on a final plan of desegregation will be set as circumstances require.

DATE: JUNE 14, 1972.

/s/ Stephen J. Roth
United States District Judge

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July 12, 1972

The Honorable Judges of the United States
Court of Appeals for the Sixth Circuit
609 Post Office Building
Cincinnati, Ohio 45202

Re: No. 72-1651, Bloomfield Hills School District, Petitioner, v. Honorable Stephen J. Roth, United States District Judge, Eastern District of Michigan, Respondent

Dear Sirs:

On June 29, 1972, the Petition for Writ of Mandamus and/or Prohibition of Bloomfield Hills School District was docketed by the Clerk of your Court. The Petition relates to the June 14, 1972 Ruling and Order of the Honorable Stephen J. Roth, Respondent to such Petition, in the so-called Detroit school desegregation case (*Bradley, et al.* v. *Milliken, et al.*, Civil Action No. 35257, United States District Court for the Eastern District of Michigan). In compliance with Rule 21, Federal Rules of Appellate Procedure, a copy of such June 14, 1972 Ruling and Order is attached to the Petition.

Thereafter, on July 10, 1972, Judge Roth entered an oral Order directing the Detroit School District to purchase 295 buses for the purpose of implementing his June 14, 1972 Ruling and Order. The State defendants in *Bradley* v. *Milliken*, namely, the Governor and Attorney General of Michigan, the State Board of Education and the State Superintendent of Public Instruction, were ordered to pay for such buses. To implement such payment, the Treasurer of Michigan was added as an additional State defendant.

The bus purchase order further evidences Judge Roth's intention

to put his June 14, 1972 metropolitan desegregation busing order into effect as of the opening of school the first week in September, less than 60 days from now.

During the course of the hearing preceding the entry of Judge Roth's bus purchase order, he candidly stated as follows:

> "To my knowledge the propriety of going to a metropolitan plan has not been decided by the United States Supreme Court except in the language used in Brown in 1954, where they in broad outline said you can do anything in order to achieve the job including dealing with school districts. They said that in '54. That is what I am relying on and they never said otherwise but they never have had a school case such as this where an order for metropolitan desegregation is the issue."

The entry of the bus purchase order underscores the urgency of immediate consideration by this Court of Bloomfield Hills School District's Petition. Accordingly, we respectfully request this Court to take such Petition under immediate advisement, to enter an order directing Judge Roth to answer such Petition immediately, and to set a date for hearing on the Petition as soon as possible thereafter. In this connection, we reiterate the prayer contained in the Petition that, in the interim, a stay of the proceedings contemplated by Judge Roth's June 14, 1972 Ruling and Order be entered.

Respectfully submitted,

DICKINSON, WRIGHT, McKEAN & CUDLIP

By: /s/ Fred W. Freeman

/s/ Charles F. Clippert

/s/ Robert V. Peterson

Attorneys for Petitioners
Bloomfield Hills School District

FWF:mak

#72-1651
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLOOMFIELD HILLS SCHOOL DISTRICT, Petitioner v. STEPHEN J. ROTH, United States District Judge, Respondent	ORDER

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges

Upon consideration, IT IS ORDERED that the application for writ of mandamus and prohibition is denied and the petition is dismissed.

This order is entered without prejudice to the right of the petitioner School District to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

Filed July 17, 1972
James A Higgins, Clerk

UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLOOMFIELD HILLS SCHOOL DISTRICT, **Petitioner,** vs. STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN, **Respondent.**	**No. 72-1651**

PETITION FOR REHEARING AND SUGGESTION FOR HEARING IN BANC

I. Events Occurring Subsequent to Filing of Petition for Writ of Mandamus and/or Prohibition.

A. The Petition for Writ of Mandamus and/or Prohibition filed by Bloomfield Hills School District (Petitioner) on June 29, 1972 alleged that the Honorable Stephen J. Roth, Respondent, (i) usurped the jurisdiction vested in him as a United States District Judge by subjecting Petitioner to his June 14, 1972 Ruling and Order in disregard of the facts that the Petitioner was not a party to the action and was not found to have committed any act of *de jure* segregation and (ii) usurped the jurisdiction exclusively vested by Title 28 U.S.C. § 2281 in a District Court of three judges by entering his June 14, 1972 Ruling and Order, which restrains the enforcement, operation and execution of various Michigan statutes. This Court denied that petition on July 17, 1972.

B. While no reasons for this Court's action were given, the order stated that the denial was without prejudice to the right of Petitioner to file an application to intervene in the case of *Bradley* v. *Milliken* pending in the United States District Court for the Eastern District of Michigan.

C. The intervening school district defendants in *Bradley* v.

Milliken filed an emergency application for stay with Respondent on July 12, 1972. A jurisdictional attack on Respondent's June 14, 1972 Ruling and Order under § 2281 comprised one of the grounds for such emergency application. On July 19, 1972, Respondent denied that application without responding to such jurisdictional attack.

D. On July 20, 1972, Respondent made a determination of finality as to the following orders in *Bradley* v. *Milliken* under Rule 54(b), F.R.C.P., and certified the issues presented therein under the provisions of 28 U.S.C. § 1292(b):

1. Ruling on Issue of Segregation, September 27, 1971;

2. Ruling on Propriety of Considering a Metropolitan Remedy To Accomplish Desegregation of the Public Schools of the City of Detroit, March 24, 1972;

3. Findings of Fact and Conclusions of Law on Detroit-only Plans of Desegregation, March 28, 1972;

4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in Support Thereof, June 14, 1972; and

5. Order of Acquisition of Transportation, July 11, 1972.

E. On July 20, 1972, this Court entered an order which, *inter alia*, advanced the appeal of *Bradley* v. *Milliken* on its docket and scheduled a hearing therein for August 24, 1972.

F. Petitioner reiterates its assertion that Respondent's June 14, 1972 Ruling and Order has the effect of enjoining the enforcement, operation and execution of a number of Michigan statutes of which the following are illustrative:

1. MCLA 340.77

> The board of any school district governed by the provisions of this chapter is authorized to locate, acquire, purchase or lease in the name of the district such site or sites within or without the district for schoolhouses, libraries, administration buildings, agricultural farms, athletic fields and playgrounds, as may be necessary; to

purchase, lease, acquire, erect or build and equip such buildings for school or library or administration or for use in connection with agricultural farms, athletic fields and playgrounds, as may be necessary; to pay for the same out of the funds of the district provided for that purpose; to sell, exchange or lease any real or personal property of the district which is no longer required thereby for school purposes, and give proper deeds or other instruments passing title to the same . . .

2. MCLA 340.352

Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gift, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained . . .

3. MCLA 340.356

All persons, residents of a school district not maintaining a kindergarten, and at least 5 years of age on the first day of enrollment of the school year, shall have an equal right to attend school therein.

4. MCLA 340.569

The board of every district shall hire and contract with such duly qualified teachers as may be required . . .

5. MCLA 340.575

The board of every district shall determine the length of the school term. The minimum number of days of student instructions shall be not less than 180. Any district failing to hold 180 days of student instruction shall forfeit 1/180th of its total state aid appropriation for each day of such failure . . .

6. MCLA 340.583

> Every board shall establish and carry on such grades, schools and departments as it shall deem necessary or desirable for the maintenance and improvement of the schools; determine the courses of study to be pursued and cause the pupils attending school in such district to be taught in such schools or departments as it may deem expedient . . .

7. MCLA 340.589

> Every board is authorized to establish attendance areas within the school district.

8. MCLA 340.614

> Every board shall have authority to make reasonable rules and regulations relative to anything whatever necessary for the proper establishment, maintenance, management and carrying on of the public schools of such district, including regulations relative to the conduct of pupils concerning their safety while in attendance at school or en route to and from school.

9. MCLA 340.882

> The board of each district shall select and approve the textbooks to be used by the pupils of the schools of its district on the subjects taught therein.

On June 29, 1972, Dr. John W. Porter, Superintendent of Public Instruction, in response to paragraph III of Respondent's June 14, 1972 Ruling and Order, filed his written report with the District Court. At pages 33 and 34 of the June 29 report, Dr. Porter discussed the implications of Respondent's June 14, 1972 Ruling and Order with respect to certain provisions of the constitution and statutes of Michigan. Pertinent portions of pages 33 and 34 of that report are annexed hereto as Appendix A.

II. Reasons For Granting Petition For Rehearing.

A. The manifest purpose of Congress in enacting Title 28, U.S.C. § 2281 was to prevent one federal judge from enjoining the

operation of state laws. The applicability of § 2281 to Respondent's June 14, 1972 Ruling and Order has been presented to Respondent and to this Court. To date neither court has discussed this jurisdictional issue on its merits. Petitioner is aggrieved by the refusal of the courts to address the merits of this issue.

Moreover, the July 20, 1972 Order of Respondent makes moot the possibility that Petitioner can obtain redress from Respondent through the procedure suggested by this Court, namely, the filing of an application to intervene in *Bradley* v. *Milliken*. Thus, this Petition for Rehearing constitutes the only effective remedy available to Petitioner.

This Court has already scheduled an August 24, 1972 hearing for the appeal in *Bradley* v. *Milliken*. Without adversely affecting the rights of the parties in that appeal, the August 24 hearing can be readily expanded to give Petitioner its day in court with respect to the issues raised in its Petition for Writ of Mandamus and/or Prohibition.

B. While it is clear that Respondent based his June 14, 1972 Ruling and Order upon the language contained in *Brown II*, 349 U.S. 294 (1955), which discusses the breadth of equitable powers available to a district court in a school desegregation case, it is also clear that *de jure* acts of segregation violative of the Fourteenth Amendment of the United States Constitution are the jurisdictional *sine quo non* for the entry of a remedial decree. It appears beyond dispute that Respondent's decree which interdicts the wide-spread operation of state statutes can be justified only upon the ground that the operation of such statutes conflicts with the Fourteenth Amendment. The convening of a three judge district court under § 2281 is mandatory when that conflict arises. Notwithstanding the opinion of Judge Merhige, (*Bradley* v. *School Board of City of Richmond, Virginia*, 324 F. Supp. 396 [1971]), it is contrary to the manifest purpose and unambiguous language of § 2281 to suggest, on the one hand, that the validity of state laws under the United States Constitution never arises when a decree in a school desegregation case is being fashioned, and to justify, on the other hand, a decree enjoining the operation of those laws on the ground that acts of *de jure* segregation in

violation of the United States Constitution have occurred.

C. *Bradley* v. *Milliken* was not a three judge court case when initially filed. *Bradley* v. *Milliken*, 433 F.2d 897 (1970), n. 2, p. 900. It becomes a three judge court case when an injunction is issued which restrains the operation of state statutes affecting 54 local school districts, 780,000 students and several thousand teachers and local school administrators upon the ground of unconstitutionality. Even the jurisdiction of this Court to hear an appeal upon issues beyond the scope of the Detroit school district is burdened by § 2281. *Stratton* v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10 (1930).

The argument in the appeal in *Bradley* v. *Milliken* will be heard in less than one month. Neither Respondent nor this Court has, as yet, responded to the merits of the jurisdictional questions raised by § 2281. The most efficient and practical way of promptly resolving the § 2281 question as well as other questions raised in the Petition for Writ of Mandamus and/or Prohibition is to hear Petitioner's arguments with respect thereto in this Court on August 24, 1972, when arguments on the issues in *Bradley* v. *Milliken* are presented.

RELIEF REQUESTED

Petitioner prays this Court to:

a. Take this Petition for Rehearing under immediate advisement;

b. Restore this cause to the calendar and set August 24, 1972 as the time for hearing the Petition for Writ of Mandamus and/or Prohibition;

c. Order Respondent to file an Answer to the Petition for Writ of Mandamus and/or Prohibition in accordance with Rule 21, F.R.A.P., and order the filing of briefs in compliance with the schedule set forth in this Court's Order of July 20, 1972, in the appeal in *Bradley* v. *Milliken*.

SUGGESTION FOR HEARING IN BANC

It is respectfully suggested that in the event the appeal in

Bradley v. *Milliken* is heard by this Court *in banc* pursuant to Rule 35, F.R.A.P., the Petition of Bloomfield Hills School District for Writ of Mandamus and/or Prohibition be heard *in banc*.

Respectfully submitted,

DICKINSON, WRIGHT, McKEAN & CUDLIP

By: /s/ Fred W. Freeman

/s/ Charles F. Clippert

/s/ Robert V. Peterson

Attorneys for Petitioners
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Dated: July 27, 1972

APPENDIX A
ABSTRACT OF DR. PORTER'S REPORT OF JUNE 29, 1972

Implications for the Interim Period

Effective implementation of the desegregation plan during the interim period may require the following actions:

1. *Amendment of, or a moratorium on, the provisions of Article IX, Section 6, of the Michigan Constitution, which sets a 15 mill limit on the property tax.*

2. *Amendment of Act 62, Public Acts of 1933, the Property Tax Limitation Act.*

3. *Amendment of Act 31, Public Acts of 1966, which deals with the assessing and collecting of taxes within a city.*

4. *Amendment of Act 190, Public Acts of 1962, which deals with adoption of special education millage on an intermediate district basis.*

5. *Amendment of, or a moratorium on, certain provisions of the School Code of 1955 which deal with the powers and duties of local school districts.*

6. *Amendment of, or a moratorium on, certain provisions of Act 336, Public Acts of 1947, the Public Employees Relations Act.*

7. *Amendment of, or a moratorium on, certain provisions of Act 4, Public Acts of 1937, the Teacher Tenure Act.*

8. *Amendment of Act 36, Public Acts of 1945, the Public School Employees Retirement Act.*

9. *Amendment of the Rules and Regulations Governing the Certification of Teachers.*

10. *Amendment of Federal Statutes and Guidelines as embodied in Title I of the Elementary and Secondary Education Act of 1965, which provides approximately*

$25 million annually to districts in the desegregation area, and is based on concentrations of children from low income families.

Implications for the Period of Full Implementation

It appears almost certain that the period of full implementation will have direct implications for the possible amendment of all the constitutional, statutory, and administrative provisions outlined in the above section dealing with the interim period. In addition, it appears the following statutes may require amendment:

(1) *The State School Aid Act.*

(2) *Those provisions of the School Code of 1955 dealing with the establishment or creation of school districts.*

(3) *Act 320, Public Acts of 1968, which deals with the establishment of area vocational centers.*

No. 72-1651
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLOOMFIELD HILLS SCHOOL DISTRICT, Petitioner, v. STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN, Respondent.	ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

No judge of this court having suggested rehearing in banc, the petition for rehearing has been considered by the original hearing panel.

It is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ James A. Higgins
Clerk

Filed August 24, 1972
James A. Higgins, Clerk

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

The Judicial Code, 28 U.S.C. § 1651(a) provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Judicial Code, 28 U.S.C. § 2281 provides:

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Rule 21 of the Federal Rules of Appellate Procedure provides in pertinent part as follows:

(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made

by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. * * *

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

Rule 19 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. * * *

The Michigan Constitution of 1963, Article VIII, Section 2, provides as follows:

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

MCLA 38.91 provides in part as follows:

> After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act. . .

MCLA 423.209 provides as follows:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

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No. 72-747

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

BLOOMFIELD HILLS SCHOOL DISTRICT,

Petitioner,

v.

STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 72-747

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

BLOOMFIELD HILLS SCHOOL DISTRICT,

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STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner filed its Petition for Writ of Certiorari in this Court on November 21, 1972. This supplement is filed pursuant to Rule 24 of the Rules of the Supreme Court of the United States to advise the Court of events subsequent to that date.

On December 8, 1972, the United States Court of Appeals for the Sixth Circuit decided the appeal in *Bradley* v. *Milliken*, ___ F.2d _____ (1972), referred to at page 4 of the Petition. Subsequently, certain parties and intervenors in *Bradley* filed timely petitions for rehearing and suggestions for rehearing in banc in the Court of Appeals. On January 16, 1973, the Court of Appeals ordered that the appeal in *Bradley* be reheard in banc. A copy of that Order is attached hereto as an appendix. The effect of the granting of the rehearing in banc is to vacate the December 8, 1972 opinion and judgment of the Court of Appeals (appendix at 2a). Oral arguments on the rehearing will be held on February 8, 1973.

Since disposition of the appeal in *Bradley* may render its Petition moot, petitioner reiterates its request that its Petition for Writ of Certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*. Petitioner will supplement its Petition in this Court promptly upon such final action by the Court of Appeals.

Respectfully submitted,

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APPENDIX

Nos. 72-1809 - 72-1814

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD BRADLEY, ET AL., Plaintiffs-Appellees, v. WILLIAM G. MILLIKEN, Governor of Michigan, etc.; Board of Education of the City of Detroit, Defendants-Appellants, and DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor-Appellee, and ALLEN PARK PUBLIC SCHOOLS, ET AL., Defendants-Intervenors-Appellants, and KERRY GREEN, ET AL., Defendants-Intervenors-Appellees.	FILED January 16, 1973 James A. Higgins, Clerk ORDER FOR REHEARING IN BANC

Nos. 72-1809, 72-1814

Before PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, McCREE, MILLER, KENT and LIVELY, Circuit Judges.

A majority of the circuit judges who are in regular active service having so voted, it is ORDERED that these appeals be reheard in banc. Rule 35(a), Fed. R. App. P.

Local Rule 3(b) of this court provides that: "The effect of the granting of a rehearing in banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal."

Oral arguments will be heard on February 8, 1973, at 2 p.m.

Entered by order of the court.

/s/ James A. Higgins

CLERK